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Participation in the World Trade Organization and foreign direct investment: national or European Union competences

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Introduction

As a true international lawyer and multilingual citizen of the world, Detlev Vagts has always shown interest in other legal cultures. He is a close observer and analyst of legal developments in Europe. Through his language abilities, Detlev Vagts has direct access, for example, to German legal thought. I hope that my contribution on German and European approaches to WTO law and foreign investment will attract his interest.

The background to my contribution is set by the Lisbon Treaty. This Treaty was the second attempt to reorganise the European Union (EU) in response to the recent enlargements and the continuing extension of its activities. A first attempt, the Constitutional Treaty, failed after it was rejected in 2005 by referenda in France and The Netherlands. The new Treaty drops most of the symbolism that characterised the Constitutional Treaty but aims to maintain much of its substantial impact – e.g. in the areas of criminal law, fundamental rights and international relations. Following a long and difficult ratification process – including a failed referendum in Ireland, seemingly endless political debate and judicial hurdles before Constitutional Courts – the Lisbon Treaty came into force on 1 December 2009 after Ireland, Germany, Poland and the Czech Republic overcame their respective domestic problems concerning ratification.

As was the case with the earlier Treaty of Maastricht,[1] the German ratification depended on a decision[2] by the German Federal Constitutional

[1] Treaty on European Union (TEU), OJ (Official Journal) C 191 of 29 July 1992.
[2] Federal Constitutional Court (Bundesverfassungsgericht, BVerfG), 2 BvR 2134, 2159/92 of 12 October 1993.

Court. That Court was seized with several complaints against the ratification of the Lisbon Treaty by the Federal Republic of Germany. In its judgment of 30 June 2009,[3] the Court allowed ratification but set out additional procedural and substantial conditions for further integration.

These conditions affect my subject in Union law, the Common Commercial Policy (CCP). The relevant provision belongs to the most heavily revised parts of the European Treaties by the Lisbon Treaty. Therefore, the subject is very topical. This concerns especially foreign direct investment (FDI) as well as trade in services and the commercial aspects of intellectual property (Art. 207 (1) TEU). In both fields, the competences of the EU will increase significantly. This implies a shift of powers from the Member States to the EU. However, the German Federal Constitutional Court's interpretation of these provisions could substantially limit this shift.

National responsibility for integration according to the German Federal Constitutional Court

Before dealing with the WTO and FDI, some explanation should be given as to why the German Federal Constitutional Court dealt with the CCP. Member States entrusted the European Court of Justice (ECJ) with interpreting the Founding Treaties. Why then did the German Federal Constitutional Court attempt to limit a shift of powers, agreed upon by the other branches of government?

Legislation accompanying the Ratification Act to the Treaty of Lisbon

According to the Constitutional Court's Lisbon Treaty decision, Germany's accompanying legislation to the ratification, the 'Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters',[4] infringes Art. 38 read in conjunction with Art. 23 of the German Constitution which concern the fundamental right to take part in elections to the German Federal Parliament and the structure of the EU. Emphasising the 'responsibility for integration' of the German legislature, the Constitutional Court, as in its Maastricht decision of 1993,[5] takes the view that the German

[3] BVerfG, 2 BvE 2/08 of 30 June 2009. For further discussion of this case, see chapter 9 by Andreas Paulus in this volume.
[4] Bundestag document 16/8489. [5] *Supra* n. 2.

legislator – for the sake of democracy – must retain more control over the European integration process:

> The European Parliament can only be a supplementary source of democratic legitimization. 'Measured against requirements in a constitutional state, the European Union lacks, even after the entry into force of the Treaty of Lisbon, a political decision-making body which has come into being by equal election of all citizens of the Union and which is able to uniformly represent the will of the people'.[6] Therefore, further substantial integration steps foreseen by the Lisbon Treaty ('passerelles'[7]) require legislative approval in Germany before the government can agree to the respective steps in the EU's Council of Ministers.

In substance, and the Constitutional Court reserves ultimate control over that, Member States must 'retain sufficient room for the political formation of the economic, cultural and social circumstances of life …, in particular the private space of their own responsibility and of political and social security, which is protected by the fundamental rights, and to political decisions that particularly depend on previous understanding ['Vorverständnisse'] as regards culture, history and language and which unfold in discourses in the space of a political public that is organized by party politics and Parliament'.[8]

For these reasons, the 'Act Extending and Strengthening the Rights of the Bundestag and the Bundesrat in European Union Matters' had to be amended in order to guarantee more democratic participation of the German legislature in the integration process.

The Ratification Act

Whereas the accompanying legislation thus had to be amended before ratification of the Lisbon Treaty, the 'Act Approving the Treaty of Lisbon' (the Ratification Act) itself required no amendments. Thus, Germany was not constitutionally required to renegotiate the Treaty. The Constitutional Court's decision therefore did not prevent Germany from ratifying the

[6] BVerfG, 2 BvE 2/08, *supra* note 3, para. 280.

[7] Passerelles are provisions enabling procedural requirements to be reduced, or other adjustments made (i.e. reducing the voting requirement from unanimity to qualified majority or reducing the requirements from special legislative procedure to ordinary legislative procedure), without formal Treaty revision. They invariably require unanimity, giving each national government, and in some cases also national parliaments, a veto. On the 'passerelles', cf. also House of Lords, European Union Committee: *The Treaty of Lisbon: An Impact Assessment, vol I: Report* (London: The Stationery Office Limited, 2008), 35 *et seq*., see www.publications.parliament.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf.

[8] BVerfG, 2 BvE 2/08, *supra* n. 3, Headnote 3.

Treaty as it stands. However, the Ratification Act is only constitutional on the condition that it is interpreted in conformity with the reasoning of the Constitutional Court's judgment. Suggestions have been made to deposit the Constitutional Court's judgment in Rome, along with the Ratification Act, as a reservation to the Lisbon Treaty or to transform that judgment into a reservation under public international law[9] – an approach which no doubt would greatly complicate the integration process.

The Constitutional Court affirms its approach of the limited primacy of Community law over national law, the core of the national constitution being excluded from primacy.[10] It maintains that the primacy depends on the national ratification of the Treaty and therefore may not affect the constitutional identity of the German State.[11] According to the ECJ, however, Community law must enjoy primacy over national law, including national constitutional law, to guarantee the uniform effect of Community law.[12]

The Constitutional Court's approach affects, of course, the relationship between the German Federal Constitutional Court and the ECJ. As the Constitutional Court observes: 'This construction, which is rather theoretical in everyday application of the law because it often does not result in practical differences as regards its legal effects, has, however, consequences for the relation of the Member States' jurisdiction to the European one. Bodies of jurisdiction with a constitutional function may not, within the limits of the competences conferred on them – this is at any rate the position of the Basic Law – be deprived of the responsibility for the boundaries of their constitutional empowerment for integration and for the safeguarding of the inalienable constitutional identity.'[13]

From its concept of national democratic responsibility for the integration process, the Constitutional Court – as guardian of the Constitution – derives its duty to interpret the Lisbon Treaty. On that basis, the Constitutional Court provides its own reading of the Treaty on many subjects, e.g. criminal law (Art. 31 (1) lit. e TEU, Art. 82f. TFEU),[14] family law (Art. 81 TFEU)[15] and the CCP (Art. 207 TFEU).[16]

[9] CSU-'Landesgruppe' in the German Bundestag: Leitlinien für die Stärkung der Rechte des Bundestages und des Bundesrates in EU-Angelegenheiten, para. 9.

[10] BVerfG, 2 BvE 2/08, *supra* n. 3, 118, para. 341 *et seq*. With the entry into force of the Lisbon Treaty on 1 December 2009, the term 'Community' has been replaced by the term 'Union'. Here, both terms are being used and are interchangeable since the focus is on the Lisbon judgement of the German Federal Constitutional Court and on past ECJ jurisdiction.

[11] *Ibid*., 118, para. 343.

[12] ECJ, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR, 1125, para. 3.

[13] BVerfG, 2 BvE 2/08, *supra* n. 3, 115, para. 336.

[14] *Ibid*., 28ff, para. 65 *et seq*.

[15] *Ibid*., 129, para. 369.

[16] *Ibid*., 129 ff, para. 370 *et seq*.

With regard to the CCP, the Constitutional Court specifically deals with WTO participation of the EU and its Member States (III) and national or EU competence in the area of FDI (IV), which I shall investigate below.

Participation in the World Trade Organization

The Constitutional Court's approach to the participation of the Member States and the EU in the World Trade Organization

The German Federal Constitutional Court is concerned that 'the membership of the Member States of the European Union in the World Trade Organization would no longer exist on a substantial level but only on the institutional and formal level'[17] and about 'the idea, that the Member State's own legal personality status in external relations gradually takes second place to a European Union which acts more and more clearly in analogy to a State . . . To the extent that the development of the European Union in analogy to a State would be continued on the Basis of the Lisbon Treaty, which is open to development in this context, this would be in contradiction to constitutional foundations.'[18] This passage almost creates the impression that Germany would lose its statehood, should it no longer be a member of the WTO.

The Constitutional Court highlights the importance of Member States' legal and diplomatic presence within the WTO, '[e]ven if the Member States will . . . normally be represented by the Commission'.[19] This is the basis for the democratic discourse within the Member States under the German Federal Constitutional Court's model of democratic legitimacy of supranational power: 'When the Federal Government informs the German Bundestag and the Bundesrat of the topics of the rounds of world trade talks and the negotiation directives adopted by the Council (Art. 218 (2) TFEU), thereby permitting them to review adherence to the integration programme and the monitoring of the Federal Government's activities, this is not only the normal exercise of its general task of information; it is constitutionally obliged to do so with a view to the joint responsibility for integration and the differentiation of tasks among the constitutional bodies under the separation of powers.'[20]

But the Constitutional Court understands the Lisbon Treaty as at any rate not requiring the Member States to waive their member status. In

[17] *Ibid.*, 131, para. 375. [18] *Ibid.*, 132, para. 376. [19] *Ibid.*, 131, para. 375. [20] *Ibid.*

this regard the Court in particular referred to negotiations on multilateral trade relations within the meaning of Art. III.2 of the WTO Agreement. Their possible future content is not determined by the law of the EU, and it could therefore fall within the competence of the Member States, depending on the course of future trade rounds.[21] The Constitutional Court considers that 'the development to date of a membership that is cooperatively mixed and is exercised in parallel might . . . be a model for other international organizations and other associations of States'.[22]

The Common Commercial Policy

At first glance the understanding of the CCP by the Constitutional Court seems to be at odds with the jurisprudence of the ECJ. However, this impression could be misleading as the ECJ itself is moving towards a cautious approach. Nevertheless, the Lisbon Treaty provides for a substantial extension of Union competences in this regard and it remains to be seen whether Member States will retain a substantial role in the future.

Exclusive nature of the Common Commercial Policy

The ECJ has consistently held that the CCP is of an exclusive nature. Member States must not 'lay claim by invoking a concurrent power, so as to ensure that their own interests were separately satisfied in external relations, at the risk of compromising the effective defence of the common interests of the Community'.[23] A crucial characteristic of such exclusive competence is the exclusion of any parallel or concurrent action on the part of the Member States. This aims to exclude unilateral action on the part of the Member States that would lead to distortions of competition.

Scope of the exclusive Common Commercial Policy: services and intellectual property?

Initially, the Commission boldly considered that the Community would enjoy exclusive competence for all matters under the WTO Agreement, including trade in services and trade-related aspects of intellectual property rights (TRIPS). But in its Opinion 1/94,[24] the ECJ rejected the

[21] *Ibid.* [22] *Ibid.*, 132, para. 376. [23] ECJ, Opinion 1/75 *OECD* [1975] ECR, 1355.
[24] ECJ, Opinion 1/94 *GATS and TRIPS* [1994] ECR, 5267, *ILM*, 34 (1995), 689.

Commission's arguments that trade in services should also be covered by 'commercial policy' or by implied powers or by powers existing in parallel internally and externally. Interpreting the term 'common commercial policy', the ECJ examined which type of trade in services was more like trade in goods and which was not. Under that approach, cross-frontier supplies of services, rendered by a supplier in one country to a consumer in another country, are like trade in goods. But this does not apply to services involving the cross-frontier movement of persons. Only the first, not the second type of services is covered by 'common commercial policy'. In principle, the CCP, as interpreted by the ECJ, comprises only trade in goods and cross-frontier services, but neither other types of services nor trade-related aspects of intellectual property rights.

Under the Treaty of Nice, the Commission again tried to bring trade in services and the trade-related aspects of intellectual property rights within the scope of the CCP and thus within the Community's exclusive competence. But that Treaty did not change the legal situation in this regard. As I set forth in my recent Opinion regarding the accession of Vietnam to the WTO[25]: Exclusive competence for the Community in the fields of trade in services and the commercial aspects of intellectual property would be better suited for ensuring the effective representation of European interests at international level. However, no such competence was acquired by the Community under the rules created by Art. 133 (5) EC. Rather Article 207 (1) of the Lisbon Treaty completes this step by means of placing the *new* fields of commercial policy on the same footing as the conventional fields, therefore expressly assigning the CCP to the exclusive competence of the Union (Art. 3 (1) lit. e TFEU). Until it entered into force, the Community's competence under Art. 133 (5) EC could, at the most, have been converted into exclusive competence in accordance with the so-called *ERTA*[26] *principles*. However, the Community has not yet acquired by that means a comprehensive exclusive competence for trade in services and the commercial aspects of intellectual property.[27]

In the following, I examine the perspectives, under the Lisbon Treaty, with regard to the German Federal Constitutional Court's three concerns:

[25] ECJ, Opinion of Advocate General Kokott in Case C-13/07 *Commission* v. *Council* (WTO – Accession of Vietnam), *European Yearbook of International Economic Law*, 2 (2011); the Commission withdrew its claim on 15 April 2011 due to the entry into force of the Lisbon Treaty.

[26] ECJ, Case 22–70 *Commission* v. *Council* ('European Agreement on Road Transport – ERTA') [1971] ECR, 263.

[27] WTO – Accession of Vietnam, *supra* n. 25, paras. 63–64.

whether the Member States' legal personality might take second place with the EU acting like a State, whether participation in international agreements might be cooperatively mixed, and whether the competence to participate in the WTO might be exercised in parallel.

Member States' legal personality taking second place with the EU acting like a State?

According to the ECJ's cautious interpretation, the exclusive CCP basically comprises trade in goods and cross-frontier services not requiring the movement of persons. Under European Law prior to the Lisbon Treaty, Member States were able to play a considerable role in the WTO, with trade in services and FDI becoming ever more important.

But under the Lisbon Treaty, these important subjects shift to the EU level and Europe's representation within the WTO thus will be more efficient. The Lisbon Treaty extends the CCP's scope explicitly to trade in 'services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade',[28] thus to most areas covered by WTO law. Therefore, some authors have even raised the question whether membership of the EU Member States alongside the EU would still make sense under the Lisbon Treaty or whether there is a Community law duty – flowing from Art. 307 EC analogously read in conjunction with Art. 10 EU (Art. 351 TFEU and Art. 4 (3) TEU) – of the Member States to withdraw from the WTO.[29]

I would not go so far as to agree with this position. Formal membership of EU Member States in the WTO does not appear to be at risk. However, only the future will show whether negotiations on multilateral trade relations will cover sufficiently important other new subjects which do not fall under exclusive EU competence, so that Member States can still in substance fulfil their role within the WTO as assigned by the German Federal Constitutional Court.

[28] Art. 207 (1) TFEU.

[29] Cf. e.g. M. Burgenberg, 'Außenbeziehungen und Außenhandelspolitik', *EuR*, Beiheft 1 (2009), 195–216, 205–6; C. Tietje, 'Das Ende der parallelen Mitgliedschaft von EU und Mitgliedstaaten in der WTO' in C. Herrmann, G. Krenzler and R. Streinz (eds.), *Die Außenwirtschaftspolitik der Europäischen Union nach dem Verfassungsvertrag* (Baden-Baden: Nomos, 2006), 161–73; C. Herrmann, 'Die Rolle der erweiterten Union in der WTO. Das Integrationsmodell der Union als geeignetes Leitbild für die Mitwirkung?' in T. Bruha and C. Nowak (eds.), *Die Europäische Union. Innere Verfasstheit und globale Handlungsfähigkeit* (Baden-Baden: Nomos, 2006), 229–36, 232.

Participation in cooperatively mixed international agreements

Outside the scope of application of the exclusive CCP, both the Member States and the EU are, in principle, competent to take external action. This applies to the negotiation phase as well as to the conclusion of international agreements – e.g. in the fields of development aid and environmental protection.

The practice of concluding mixed agreements with the Community as well as its Member States on the one side and third countries on the other side has been subject to critique. This practice does not serve legal certainty, because the question of national or Community competence may be avoided.[30] Also, the procedure to conclude mixed agreements is burdensome, because all EU Member States besides the Commission need to be integrated into the negotiation process, and ratification by all EU Member States is required. Therefore, the Commission's policy is to interpret the CCP broadly and thus to reduce the need to have recourse to 'mixed agreements'.

The ECJ also started from the basis that the CCP may not be interpreted restrictively on the ground that to do so would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries.[31] It recognised the legitimate concern of the Commission that the Community's unity of action *vis-à-vis* the rest of the world would be undermined and its negotiating power greatly weakened through separate and individual actions of the Member States. The solution, however, is not judicial extension of the scope of application of the exclusive CCP, but cooperation. The ECJ

> stressed, first, that any problems which may arise in implementation of the WTO Agreement and its annexes as regards the coordination necessary to ensure unity of action where the Community and Member States participate jointly cannot modify the answer to the question of competence, that being a prior issue. As the Council has pointed out, resolution of the issue of the allocation of competence cannot depend on problems which may arise in administration of the agreements. Next, where it is apparent that the subject-matter of an agreement or convention falls in part within the competence of the Community and in part within that of

[30] Cf. C. Vedder and S. Lorenzmeier, 'Article 133' in E. Grabitz and M. Hilf (eds.), *EUV/EGV*, 5 vols. (Munich: Beck, 2008), vol. II, para. 26.

[31] Cf. ECJ, Opinion 1/78 *International Agreement on Natural Rubber* [1979] ECR 2871, para. 45; K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union*, 2nd edn. (London: Sweet & Maxwell, 2005), 828–43, 829.

> the Member State, it is essential to ensure close cooperation between the Member States and the Community institutions, both in the process of negotiation and conclusion and in the fulfilment of commitments entered into.[32]

The ECJ thus recognises the imperative of cooperating, particularly within the WTO. But the scope of application of the duty to cooperate shrinks in reverse proportion to the increase of the exclusive CCP. Against this background, the German Federal Constitutional Court's judgment assumes and suggests a restrictive interpretation of the exclusive CCP.

Membership exercised in parallel?

At first glance the German Federal Constitutional Court seems to point towards parallel competences as a way to ensure a sufficient role of the Member States in the CCP. The issue of parallel external competences regarding commercial policy has recently been discussed in two procedures.[33] However, as we shall see, already under current law parallel competences are excluded as far as the CCP is concerned; parallel competences also seem to be excluded in the areas of trade in services and the commercial aspects of intellectual property. The Lisbon Treaty would not step back behind this *acquis*. Moreover, it is doubtful, whether – as the Constitutional Court held – parallel competences may arise as far as commercial policy is combined with political issues.

Parallel competences under Community law

Regarding trade in services and the commercial aspects of intellectual property, it would be 'permissible for the Member States to be involved alongside the Community on the basis of Article 133 (5) EC only if there were *parallel competence*s of the Community and the Member States in relation to trade in services and the commercial aspects of intellectual property'.[34] The Treaty sometimes confers parallel competences to the EC and the Member States, e.g. in Art. 181 EC on development policy whose wording is similar to Art. 133 (5) EC. Under the ECJ's case-law, parallel competence under Art. 181 (2) EC means that the

[32] Opinion 1/94 *GATS and TRIPS*, *supra* n. 24, paras. 107–8.
[33] WTO – Accession of Vietnam, *supra* n. 25, and Opinion 1/08, not yet published in the ECR, on modification to the agreements regarding limitations and withdrawals of specific engagements of new Member States of the EU under the General Agreement on Trade in Services (GATS).
[34] WTO – Accession of Vietnam, *supra* n. 25, para. 67, emphasis in the original Opinion.

Member States are entitled to enter into commitments themselves *vis-à-vis* non-Member States concerning development cooperation, either collectively, individually, or jointly with the Community.[35] Parallel competences also exist in the areas of economic, financial and technical cooperation with third States, in a similar manner as they exist in competition law (Arts. 81 EC and 82 EC). Because Community and national competition law consider restrictive practices from different perspectives, it is consistent with the case-law of the ECJ that they are applicable in parallel. Here again, it is consistent with the meaning and purpose of the relevant rules of the EC Treaty to assume that the Community and the Member States have parallel powers.[36]

Parallel competences for trade in services and the commercial aspects of intellectual property?

Teleological interpretation, *effet utile* Despite the similarity of wording, the same reasoning does not necessarily apply to development cooperation (Art. 181 (2) EC) and to commercial policy. 'Thus, in the field of development cooperation, Community policy only complements that of the Member States in that field (Art. 177 (1) EC). Independent action by the Member States in that field, whether collectively, individually or jointly with the Community, can share out the financial and technical burdens of development cooperation in Europe over several shoulders.'[37] In the end, more development aid or more economic, financial and technical cooperation with third States may result.

In the field of external trade, the situation is different. In negotiations where the interests of the Community and its Member States must be represented, especially against other significant trading partners, the negotiating position of both Member States and the Community is weakened the more players are involved at the international level. In the CCP, agreements where both the Community as well as the Member States are parties, are 'consequently out of place'. A voluntary involvement of the Member States alongside the Commission, representing the Community, is thus not permissible in matters concerning Art. 133 (5) EC. This provision calls for a concurrent or shared competence, meaning that the Member States may no longer exercise their powers

[35] ECJ, Case C-316/91 *Parliament* v. *Council* ('European Development Fund – EDF') [1994] ECR I-625, paras. 26 and 34.
[36] WTO – Accession of Vietnam, *supra* n. 25, para. 71. [37] *Ibid.*, para. 70.

when the Community exercises its own powers in the area of trade in services and the commercial aspects of intellectual property.[38]

Art. 133 (5) sub-para. 4 EC Nevertheless, the Council has argued that Art. 133 (5) sub-para. 4 EC provides for parallel competences.[39] It lays down that '[t]his paragraph shall not affect the right of the Member States to maintain and conclude agreements with third countries or international organizations in so far as such agreements comply with Community law and other relevant international agreements'. Member States must thus observe Community law when exercising their reserved competences. Parallel competence might appear to result from 'the right of the Member States to maintain and conclude agreements with third countries or international organisations'.

But, Art. 133 (5) sub-para. 4 EC may also be understood 'simply as an expression of the concurrent nature of the new powers in relation to external trade'.[40] This concurrent nature is expressed in particular in the ERTA case-law. Under ERTA, internal Community legislation in a particular field entails an implied corresponding external competence.[41] Such competences are concurrent in so far as they allow independent Member State legislation as long as they have not been exercised by the Community. And '[b]earing in mind the objective of representation of Community interest at international level which should be as effective as possible, the Member States cannot be allowed, without restriction, to maintain or conclude agreements with non-member countries or international organizations in the fields of trade in services and the commercial aspects of intellectual property, but may do so only in so far as the Community itself does not act'.[42]

In other words, the competence for trade in services and the commercial aspects of intellectual property is concurrent and not parallel. The same approach should apply to further aspects of the CCP as introduced by the Lisbon Treaty.

Parallel competences under the 'new' Common Commercial Policy?

Already under the Treaty regime prior to Lisbon, the EC often combined various political objectives with its external policy in the same

[38] *Ibid.*, paras. 72 and 74 *et seq.* [39] *Ibid.*, para. 50 *et seq.* [40] *Ibid.*, para. 77.
[41] Cf. *supra* nn. 26 and 27. [42] WTO – Accession of Vietnam, *supra* n. 25, para. 77.

agreement.[43] The Lisbon Treaty reinforces that trend: pursuant to the Lisbon Treaty the CCP 'shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty of the European Union [general provisions on the area of freedom, security and justice]'.[44] This among other things refers to democracy, the rule of law, human rights, the general principles of law, the Charter of the United Nations, sustainable development, integration of developing countries into the world economy, environmental protection and global governance.[45] Such politicisation of the CCP[46] may introduce all kinds of subjects to negotiations on multilateral trade relations which – according to the German Federal Constitutional Court – might fall within the competence of the Member States in the future, depending on the course of future trade rounds.[47]

It remains to be seen whether the ECJ will share this approach. Arguments against the Constitutional Court's approach would be that the Lisbon Treaty only takes up an already existing development: CCP has, for decades, also pursued political goals. Already in 1995, the ECJ held that a measure 'cannot be treated as falling outside the scope of the common commercial policy on the ground that it has foreign policy and security objectives'.[48] Moreover, under the Lisbon Treaty the exclusive CCP is part of the general external action by the Union which shall be guided by political principles (cf. Arts. 205 and 206 TFEU read together with Art. 21 TEU).

To sum up, parallel competences in the area of the CCP are excluded. Whether 'new political' subjects in trade agreements might lead to a parallel competence of the Community and Member States for such negotiations and agreements remains doubtful.

Investment law

The ECJ has not yet had to answer the question whether FDI is covered by the CCP as it stands. Even though it would not be linguistically impossible to include FDI in the CCP, legal doctrine rejects this

[43] Cf., e.g., C. Tietje, 'Die Außenwirtschaftsverfassung der EU nach dem Vertrag von Lissabon', *Beiträge zum Transnationalen Wirtschaftsrecht*, 83 (2009).
[44] Art. 205 TFEU. [45] Cf. Art. 21 (2) TEU.
[46] Tietje, 'Die Außenwirtschaftsverfassung', *supra* n. 43, 19–20.
[47] BVerfG, 2 BvE 2/08, *supra* n. 3, 131, para. 375.
[48] ECJ, Case C-70/94 *Werner* [1995] ECR I-3189, 3223, para. 10; see also ECJ, Case C-83/94 *Leifer* [1995] ECR I-3231.

proposition.[49] An important argument is that the proposal to create an explicit Community competence for FDI in the Treaty of Nice had been rejected. The Commission had proposed to reformulate Art. 133 (1) EC as follows:

> The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalization, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies.[50]

As this proposal was rejected it must be assumed that FDI, along with trade in services and intellectual property, are not covered by the classical concept of 'common commercial policy'. Only the Lisbon Treaty finally took up this proposal and included FDI in Art. 207 (1) TFEU. In view of the legislative history it should be understood as a constitutive, not merely declaratory provision.

The German Federal Constitutional Court on foreign direct investment

The German Federal Constitutional Court also comments on the extension of the CCP to FDI. It highlights the differences of opinion on the protection of property on the international level: 'For decades, far-reaching ideologically motivated differences have existed concerning the socio-political importance of the fundamental liberty right to property'.[51] The supranationalisation of FDI is of great impact: 'The vast majority of foreign assets, which for the Federal Republic of Germany amounted to 5,004 billion Euros in 2007, falls under the scope of application of 126 investment protection agreements currently in force. At the end of 2007, a total of 2,608 bilateral investment protection agreements existed worldwide.'[52]

Under Art. 207 (1) TFEU, the exclusive CCP explicitly includes FDI.

[49] E.g. M. Hahn 'Article 133', in C. Calliess and M. Ruffert (eds.), *EUV/EGV*, 3rd edn. (Munich: Beck, 2007), para. 48.

[50] COM(2000) 34 final, 'Adapting the institutions to make a success of enlargement. Commission Opinion in accordance with Article 48 of the Treaty on European Union on the calling of a Conference of Representatives of the Governments of the Member States to amend the Treaties', 49.

[51] BVerfG, 2 BvE 2/08, *supra* n. 3, 132, para. 377. [52] *Ibid*., 132, para. 378.

The German Federal Constitutional Court considers this an extension of the CCP which should be interpreted narrowly *ratione materiae* as well as *ratione temporis*. *Ratione materiae*, according to the Constitutional Court '[m]uch . . . argues in favour of assuming that the term "foreign direct investment" only encompasses investment which serves to obtain a controlling interest in an enterprise'.[53] Consequently, an exclusive competence of the Union would exist only for investment of this type whereas investment agreements that go beyond must be concluded further on as mixed agreements.

Rationae temporis, the Constitutional Court invokes Art. 351 TFEU (Art. 307 EC) according to which 'rights and obligations arising from agreements concluded before 1 January 1958 . . . between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty', from which it concludes that '[t]he continued legal existence of the agreements already concluded is not endangered. International agreements of the Member States that were concluded before 1 January 1958 shall in principle not be affected by the Treaty establishing the European Community (Art. 307 (1) EC; Art. 351 (1) TFEU). In many cases this provision is not directly applicable because bilateral investment protection agreements have, as a general rule, been concluded more recently,[54] but the legal concept that a situation in the Member States which qualifies as a legal fact will in principle not be impaired by a later step of integration.'[55]

'Direct investment' under the EC Treaty

The EC Treaty uses the term 'direct investment' only in Art. 57 EC with regard to the free movement of capital. This is the only fundamental freedom that not only applies to movement between the Member States but also extends to third countries. Art. 57 (1) and (2) EC provide for the continued application of existing restrictions with regard to third countries and for the adoption of new measures. In this context they refer to 'direct investment – including in real estate – establishment, the

[53] *Ibid*., 133, para. 379.

[54] The world's first bilateral investment treaty was signed in 1959 between Germany and Pakistan; cf. A. Zampetti and P. Sauve, 'International Investments', in A. Guzmán and A. Sykes (eds.), *Research Handbook in International Economic Law* (Cheltenham: Edward Elgar, 2007), 211–70, 215.

[55] BVerfG, 2 BvE 2/08, *supra* n. 3, 133, para. 380.

provision of financial services or the admission of securities to capital markets'.

Many questions regarding the definition of FDI under Community law are still unanswered: (a) whether Art. 57 (1) EC covers only investment serving to obtain a controlling interest in an enterprise as set forth by the German Federal Constitutional Court; (b) whether 'direct investment' in Art. 57 EC is the same as 'foreign direct investment' in Art. 207 (1) TFEU, whether 'direct' in the sense of FDI under Art. 207 EC is to be construed broadly or restrictively and whether investment protection is covered as well as investment liberalisation; and finally (c) the applicability of Art. 307 EC *ratione temporis*.

'Direct investment' under Art. 57 EC

Legal doctrine and the ECJ take Council Directive 88/361[56] as an indicator for interpreting the concept of direct investment.[57] In its 2006 judgment in *Test Claimants in the FII Group Litigation*[58] the ECJ held:

> As regards, more particularly, the concept of 'direct investment', it must be stated that this is not defined by the Treaty. Nevertheless, that concept has been defined in Community law in the nomenclature of the capital movements set out in Annex I to Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty [article repealed by the Treaty of Amsterdam], which sets out 13 categories of capital movements. It is settled case-law that, inasmuch as Article 56 EC substantially reproduced the content of Article 1 of Directive 88/361, . . ., that nomenclature retains the same indicative value, for the purposes of defining the term 'movement of capital', as it did before their [now Arts. 56–60 EC] entry into force, subject to the qualification, contained in the introduction to the nomenclature, that the list set out therein is not exhaustive. The same indicative value must be given to that nomenclature in interpreting the concept of direct investment. The first section of that nomenclature, entitled 'Direct investments' includes the establishment and extension of branches or new undertakings belonging solely to the person providing the capital and the acquisition in full of existing undertakings, participation in new or existing undertakings with a view to establishing or maintaining lasting economic links, . . . and reinvestment of profits with a view to maintaining lasting economic links. As that list

[56] Council Directive 88/361/EEC of 24 June 1988 for the implementation of Article 67 of the Treaty, OJ L 178, 8.7.1988, 5–18.

[57] Cf. ECJ, Case C-446/04 *Test Claimants in the FII Group Litigation* [2006] ECR I-11753, para. 178 *et seq*. with references to earlier cases; see also the Opinion of Advocate General Geelhoed, para. 117 *et seq*.

[58] *Test Claimants in the FII Group Litigation*, *supra* n. 57, para. 177 *et seq*.

> and the relative explanatory notes show, the concept of direct investments concerns investments of any kind undertaken by natural or legal persons and which serve to establish or maintain lasting and direct links between the persons providing the capital and the undertakings to which that capital is made available in order to carry out an economic activity.[59]

The following passage from the ECJ's judgment is interesting when compared with the German Federal Constitutional Court's approach according to which 'much ... argues in favour of assuming that the term "foreign direct investment" only encompasses investment which serves to obtain a controlling interest in an enterprise'.[60] According to the ECJ, '[a]s regards shareholdings in new or existing undertakings, as the explanatory notes confirm, the objective of establishing or maintaining lasting economic links presupposes that the shares held by the shareholder enable him, either pursuant to the provisions of the national laws relating to companies limited by shares or otherwise, to participate effectively in the management of that company or its control'.[61]

It remains to be seen whether to 'participate effectively in the management' (ECJ) of a company or its control is the same as 'serves to obtain a controlling interest in an enterprise' (German Federal Constitutional Court).

The ECJ did not interpret FDI restrictively in other respects. Thus, the ECJ held that 'the restrictions on capital movements involving direct investment or establishment within the meaning of Article 57 (1) EC extend not only to national measures which, in their application to capital movements to or from non-member countries, restrict investment or establishment, but also to those measures which restrict payments of dividends deriving from them'.[62]

The underlying Annex I to Directive 88/361 emphasises the element of time – establishment or maintenance of *lasting* economic links – rather than that of control. Although both criteria often coincide, they do not always overlap.

Nevertheless, 'much argues in favour', as the Constitutional Court put it, that foreign *direct* investment, as opposed to foreign investment, involves direct management of the investment by its foreign controller,[63] and hence that short-term portfolio investments are not covered.

[59] *Ibid*., para. 77 *et seq*. [60] Cf. *supra* n. 53.
[61] *Test Claimants in the FII Group Litigation*, *supra* n. 57, para. 182. [62] *Ibid*., para. 183.
[63] S. Daya Amarasinha and J. Kokott, 'Multilateral Investment Rules Revisited', in P. Muchlinski, F. Ortino and C. Schreuer (eds.), *The Oxford Handbook on International Investment Law* (Oxford University Press, 2008), 119–54, 120.

'Foreign direct investment' under Art. 207 TFEU

The question remains whether 'direct investment' under Art. 57 EC is identical with 'foreign direct investment' under Art. 207 TFEU.[64] The wording is similar, but the two provisions fulfil different functions: Art. 57 EC is a transitory provision, exceptionally allowing restrictions to the free movement of capital. As a general rule, exceptions are to be construed narrowly.[65] Art. 207 TFEU defines the foreign commercial policy and thus the reach of the exclusive EU competence. The interpretation rule for exceptions therefore does not apply.

Wording Generally, identical terms in one document should be interpreted as having the same meaning. Therefore, the elements of long-time establishment or maintenance of economic links as well as effective participation in the management or control are equally relevant under Art. 207 TFEU. Those two elements reflect the public international law approach to direct investment.[66] But international law provides no clear-cut criteria for a definition of investment. Under the draft Multilateral Agreement on Investment of 1998, as well as under NAFTA, the definition of investment is very wide, even including portfolio investment; most bilateral investment treaties equally apply broad definitions of investment.[67] However, when the reference specifically is to *direct* investment, portfolio investments are excluded. Foreign investment can indeed be divided into FDI and indirect – or portfolio – investment where the element of direct management of the investment by its foreign controller is absent.[68] In his book on *Transnational Legal Problems*,[69] Detlev Vagts refers to '[t]he decision to seek profits by direct participation in the economic life of another country – through establishment of a foreign branch or wholly-owned subsidiary, or through a company owned jointly with nationals of the foreign country'.

[64] Cf. also Tietje, 'Die Außenwirtschaftsverfassung', *supra* n. 43, 16.
[65] On Art. 57 EC, see also ECJ, Opinion of Advocate General Geelhoed in *Test Claimants in the FII Group Litigation*, *supra* n. 57, para. 117.
[66] Cf. J. Ceyssens, 'Towards a Common Foreign Investment Policy? – Foreign Investment in the European Constitution', *Legal Issues of Economic Integration*, 32 (2005), 259–91, 274–5) with references.
[67] Amarasinha and Kokott, 'Multilateral Investment Rules', *supra* n. 63, 138 with references.
[68] *Ibid.*, 120.
[69] D. F. Vagts, H. J. Steiner and H. H. Koh, *Transnational Legal Problems*, 4th edn. (Westbury, NY: Foundation Press, 1994).

Therefore, it appears reasonable to assume that portfolio or indirect investments are not covered by the newly formulated commercial policy under Art. 207 TFEU. But room remains for clarifying the precise criteria for the 'direct' in 'foreign direct investment' – e.g. participation in the management or control, or serving 'to obtain a controlling interest in an enterprise'.

Moreover, even though the Treaty of Lisbon clearly lists FDI as an EU competence, it is not clear whether this includes both investment protection and investment liberalisation. Some maintain that only investment liberalisation is covered.[70] However, I believe that the distinction between these two fields would be difficult to maintain in practice.

'*Effet Utile*' and implied powers as applied to the Common Commercial Policy Against this background it is useful to examine whether one should start from a more generous understanding of the common commercial policy in the sense of '*effet utile*' or implied powers, or whether one should adopt a restrictive understanding of that exclusive Community competence when interpreting FDI.

'*Effet utile*' and implied powers are recognised principles for the construction of Community law. As the German Federal Constitutional Court phrased it: 'Whoever relies on integration must expect the independent opinion formation of the institutions of the Union. What must therefore be tolerated is a tendency towards maintaining the *acquis communautaire* and to effectively interpreting competences along the lines of the US doctrine of implied powers or the principle of *effet utile* under the law of international agreements. This is part of the mandate of integration which is wanted by the Basic Law.'[71]

Accordingly, under the ERTA case-law the ECJ held that the system of internal Community measures cannot be separated from that of external relations. Rather, internal competences may imply external competences. Thus, the Community's authority to enter into international agreements arises not only from an express conferment by the Treaty – as is the case with Art. 113 of the EEC Treaty (after modification now Art. 133 EC) and 114 of the EEC Treaty (in the meantime repealed) for tariff and trade agreements and with Art. 238 of the EEC Treaty (after modification now Art. 310 EC) for association agreements – but may equally flow from other

[70] Cf. S. Woolcock, 'The Potential Impact of the Lisbon Treaty on European Union External Trade Policy', *European Policy Analysis*, 8 (2008), 1–6.

[71] BVerfG, 2 BvE 2/08, *supra* n. 3, 77, para. 237.

provisions of the Treaty and from measures adopted, within the framework of those provisions, by the Community institutions.[72]

However, the ECJ did not always interpret the scope of the CCP extensively using the *effet utile* or implied powers doctrines. Rather, in its Opinion 1/94,[73] it rejected the Commission's arguments that trade in services should also be covered by 'commercial policy' or by implied powers or as powers existing in parallel internally and externally.[74]

Therefore it cannot be generally assumed that '*effet utile*' and implied powers can be relied on to extensively interpret external Community competences.

The principles of subsidiarity and proportionality as applied to the Common Commercial Policy

Subsidiarity The German Federal Constitutional Court reserved its right to review whether legal instruments of the European institutions adhere 'to the principle of subsidiarity under Community and Union law [and] keep within the boundaries of the sovereign powers accorded to them by way of conferred power'.[75] The principle of subsidiarity,[76] however, applies only to areas which do not fall within the exclusive competence of the Union. It is in the first place a principle governing the exercise of concurrent Community competences, but it may also influence the interpretation of the reach of an exclusive competence. '[E]xclusive Community competence is the exception and, as a rule, the Community shares its areas of competence with the Member States because only in that way is it possible to ensure that the principle of subsidiarity, a fundamental stipulation of the Treaties which applies only to non-exclusive competence (second paragraph of Art. 5 EC), has appropriate scope for application . . . Against that background it by no means necessarily follows that the exclusive nature of the competence under Article 133 (1) EC also extends to the new competence under Article 133 (5) EC created by the Treaty of Nice.'[77] A similar argument could be made for interpreting 'foreign direct investment' under Art. 207 (1) TFEU restrictively.

Proportionality Similarly, the principle of proportionality may influence the interpretation of Union competences in a way to protect

[72] *ERTA* case, *supra* n. 26, paras. 15–16. [73] Opinion 1/94 *GATS and TRIPS*, *supra* n. 24.
[74] Cf. *supra* n. 24. [75] BVerfG, 2 BvE 2/08, *supra* n. 3, Headnote 4.
[76] Art. 5 (2) EC; also Art. 5 (3) TEU as amended by the Lisbon Treaty.
[77] WTO – Accession of Vietnam, *supra* n. 25, paras. 55–56.

national powers and national sovereignty.[78] 'Under the principle of proportionality, the content and form of Community action shall not exceed what is necessary to achieve the objectives of the Treaties.'[79]

Interim conclusion The preceding overview shows the ECJ's careful approach to the exclusive Community competences under the CCP. The ECJ has not always interpreted the CCP extensively. Rather, it is sensitive to the concerns of EU Members States regarding their external powers, even in a context where this remarkably complicates international negotiations. The principles of subsidiarity and proportionality further support such an approach.

The Lisbon Treaty seems to leave room for mixed investment agreements, at least with regard to portfolio investments.

Applicability of Art. 307 EC *ratione temporis*: Investment Agreements Concluded Before 1 January 1958 or Before Accession

According to Art. 307 EC '[t]he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty'.

In the absence of any empirical case in this particular policy-field of bilateral investment treaties, the German Federal Constitutional Court assumes that the concept of Art. 307 EC also covers subsequent agreements when the competence of the Community results from a subsequent step of integration.[80] This is in accordance with legal practice[81] and doctrine. Only some authors require in addition that the development of a Community competence in the subject matter was not

[78] Lenaerts and van Nuffel, *Constitutional Law*, *supra* n. 31, 112 *et seq*.
[79] Art. 5(3) EC; also Art. 5(4) TEU as amended by the Lisbon Treaty.
[80] BVerfG, 2 BvE, 2/08, *supra* n. 3.
[81] COM(2002) 649 final, 'Communication from the Commission on the consequences of the Court judgements of 5 November 2002 for European air transport policy', 7–9, paras. 30, 33, 38, 39; Regulation (EC) No. 847/2004 of the European Parliament and of the Council of 29 April 2004 'on the negotiation and implementation of air service agreements between Member States and third countries', OJ L 195 of 2 July 2004, 3–6, para. 6; cf. also F. Hoffmeister, 'Bilateral Air Transport Agreements between Several EU Member States and the United States ("Open Skies")', *AJIL*, 98 (2004), 567–72, 571.

predictable.[82] In view of the dynamics of integration, the latter condition would not be easy to fulfil.

Obligation to eliminate incompatibility

In any event, the Member States 'shall take all appropriate steps to eliminate the incompatibilities established' (Art. 307 EC). The ECJ has recently emphasised this duty with regard to investment treaties the respective Member States concluded with third States prior to their accession.[83] Such incompatibilities typically arise from substantial provisions – e.g. the basic freedoms – but not from violation of concurrent external competences of the Community as such. As long as the Community does not exercise concurrent competences, Member States in principle remain free to act. However, specific competences may result in more far-reaching obligations. Because the powers to adopt financial sanctions under Art. 57 (2) EC, 59 EC and 60 (1) EC are granted to allow immediate Community action, Member States must abolish potential loopholes to future sanctions even before they are adopted by the Community.[84] Therefore, in these cases the mere existence of a competence was sufficient to require an alignment of Member State agreements. In contrast, there is no obvious reason why a concurrent Community competence to enter into agreements on FDI as such should be affected by existing Member State agreements.

Concluding remarks

Based on its role as guardian of the Constitution and of German sovereignty, the German Federal Constitutional Court has given its own interpretation of the articles of the Lisbon Treaty concerning membership in the WTO and FDI. Until now, the development of this field of the law, the CCP, as well as of other fields of Community law, appear as the result of the interaction between the Treaty-making powers of the governments and Treaty interpretation by the ECJ. Now, the Constitutional Court strives to intervene as a third player.

[82] See, e.g., J. Kokott, 'Article 307', in R. Streinz (ed.), *EUV/EGV* (Munich: Beck, 2003), para. 7; K. Schmalenbach, 'Article 307', in Calliess and Ruffert (eds.), *EUV/EGV*, *supra* n. 49, para. 5; P. Manzini, 'The Priority of Pre-Existing Treaties of EC Member States within the Framework of International Law', *EJIL*, 12 (2001), 781–92, 786.

[83] Cases C-205/06 *Commission* v. *Austria* [2009] ECR I-1301 and C-249/06 *Commission* v. *Sweden* [2009] ECR I-1335.

[84] *Ibid.*, paras. 28 and 29.

It is not so much the content of the German Federal Constitutional Court's judgment on the Lisbon Treaty that is remarkable. It is rather the fact that – as well as the extent to which – a national constitutional court deals with the interpretation and application of the Lisbon Treaty, a function which the Member States conferred upon the ECJ in view of ensuring a uniform interpretation throughout the EU.

The German Federal Constitutional Court makes clear that Germany – and within Germany, the Constitutional Court – controls the integration process. In part, the decision could be read as only mandating the German legislature to control the process. The procedural requirements laid down by the Court on the one side require Parliament to decide on the degree of integration, while on the other side the Court lays down substantial limits to integration. Thereby, it takes away from Parliament at least some of the powers pertaining to it as an equally supreme branch of government. The Constitutional Court protects Parliament against itself. It thus makes sure that Parliament does not transfer too much power to the EU, even if integration is politically wanted and even if the directly elected representatives of the people come to the conclusion that some powers can be exercised more efficiently on the supranational level.[85] Still, a positive effect of the Constitutional Court's decision can lie in better information of Parliament by the government and a more lively parliamentary debate in European matters.

The practical consequences of the Lisbon judgment will depend on the standard of scrutiny which the Constitutional Court itself is going to apply. Fortunately for European integration, the judgment hints at a low standard: 'It is a consequence of the continuing sovereignty of the Member States that at any rate if the mandatory order to apply the law is *evidently* lacking, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court'.[86]

What I find most peculiar – beyond the specific case of the Lisbon judgment – is the self-image of the German Federal Constitutional Court. The decision reads like a piece of mandatory advice from a council of wise statesmen, rather than a judgment of a court which typically decides cases and controversies between parties. One might also wonder why the newly introduced unilateral right to leave the Union (Art. 50

[85] For judicial self-restraint in view of the separation of powers, cf. Czech Constitutional Court, Lisbon Treaty II, Judgement of 9 November 2009, para. 111 *et seq*.

[86] BVerfG, 2 BvE 2/08, *supra* n. 3, 116, para. 339 (emphasis added).

TEU as amended by the Lisbon Treaty) is not sufficient proof of the Member States' continuing sovereignty.

It remains to be hoped that the judgment supports, or at least does not undermine, the effective representation of German interests at the European level. Particularly with regard to the WTO and FDI, Europe hopefully will become a more efficient partner in multilateral trade negotiations now that the Lisbon Treaty has entered into force.